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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Extension of Term and for Extension of Time to File Motion for Reconsideration of Decision

MORRIS L. ERNST
WILLIAM A. ROBERTS
Solicitors for Petitioner

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COMES NOW THE PETITIONER, the Schenectady Union Publishing Company by Morris L. Ernst, its solicitor, and respectfully shows:

On April 13, 1942, this Court affirmed the judgment of the Circuit Court of Appeals for the Second Circuit herein by an equally divided Court, Mr. Justice JACKSON taking no part in the consideration or decision of the case. Rehearing was applied for on May 8th and denied on May 11, 1942.

In view of this Court's consistent policy against allowing an affirmance by an equally divided court to stand as its final disposition of a controversy,[1] it would seem that its prompt denial of the Petition for Rehearing herein derived from its belief that neither a change in the number

[1] See Petition for Rehearing, pp. 1, 2.

or identity of the Justices passing on the case nor in their divergent conclusions thereon was immediately likely. The next few months, however, will witness important developments in other Sweeney litigations[2] which may have a crucial bearing hereon, as well as the final outcome of the *Hall* case,[3] which may produce a New York Court of Appeals pronouncement on the rules of libel properly referable to public officials in New York. We therefore ask for an extension of term to make possible a reconsideration of the instant case by this Court in October, if in the light of further developments reconsideration appears indicated at that time. Such an extension would accord with this Court's historic practice of holding cases over for as long as four years in order to break a tie.[4]

The national significance of the instant case and the importance of the legal issues involved were recognized by this Court when it granted certiorari and are fully developed in our Petition for Certiorari, our main brief and our Petition for Rehearing.

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[2] *E. g.*, the time within which to apply for certiorari has not yet expired in *Sweeney* v. *Philadelphia Record Co.* (3 cases) decided February 25, 1942, dismissing complaints on motion. A decision is expected shortly in *Sweeney* v. *Patterson*, argued before the Court of Appeals for the District of Columbia on February 11, 1942. *Sweeney* v. *United Features Syndicate, Inc.*, which like the instant case involves New York law, was argued before the Circuit Court of Appeals for the Second Circuit on May 18, 1942. Decisions may be rendered by the Circuit Court of Appeals in the nine Kansas cases in which appeals are pending, as shown in Appendix B to Petition for Rehearing.

[3] *Hall* v. *Binghamton Press Co.*, decided by the New York Appellate Division, Third Department, on March 4, 1942; see Petition for Rehearing, pp. 7-8.

[4] See *e. g.*, *Home Insurance Company* v. *New York*, 119 U. S. 129, 122 U. S. 636, 134 U. S. 594, originally decided at the October term, 1886 and not finally reargued until May 18-19, 1890; *The Selma Rome & Dalton R. R. Co.* v. *U. S.*, 122 U. S. 636, 637, 139 U. S. 560 (petition granted March 28, 1887, reargument had on March 25-26, 1891); *U. S.* v. *Sischo*, 260 U. S. 699, 262 U. S. 165 (rehearing granted November 23, 1922, reargument had April 23, 1923).

WHEREFORE, we respectfully move that for the purposes of this case the present term be extended to the 26th day of October, 1942, and that petitioner's time within which to file a motion for a reconsideration of the judgment herein and the decision denying rehearing be likewise extended.

MORRIS L. ERNST,
WILLIAM A. ROBERTS,
Solicitors for Petitioner.

Of Counsel:
BENJAMIN KAPLAN,
HARRIET F. PILPEL,
EDGAR TURLINGTON.

I, MORRIS L. ERNST, Solicitor for the above named Petitioner, do hereby certify the foregoing motion for extension of term and extension of time to file motion for reconsideration is presented in good faith and not for delay.

Dated, New York, May 19, 1942.

MORRIS L. ERNST.